# OFFICE OF THE STAFF JUDGE ADVOCATE
# 48TH FIGHTER WING, RAF LAKENHEATH, UK

# WILLS AND POWERS OF ATTORNEY:
## Do You Need Them … And Why?

**WILLS - Introduction**

The Legal Office often gets the question: "Do I need a will?" And we often give the same answer: "Well, it depends." In order to properly answer this question, it's important to understand the distinction between the three types of documents that we prepare for you. The first document is the ***will*** itself. A will is a legal document that designates how you want your money and property (your estate) to be distributed after your death. It also specifies your wishes regarding funeral and burial arrangements, and, if you have children who are minors, it states whom you request the court to appoint as their guardian.

The second document is the ***living will.*** This documents contains directives concerning the termination of medical treatment. This document provides that the signer's life shall not be artificially prolonged by extraordinary measures when there is no reasonable expectation of recovery. Finally, a ***durable power of attorney*** is a document that authorizes a third party to make health care decisions in the event you become incapacitated. Unlike a living will where your wishes are provided, this document allows another person to "step in your shoes" and make decisions concerning your medical care on your behalf.

Other definitions and key concepts are important to fully understand the will process. Some of these definitions are detailed below.

1. ***Testator***. A testator is a name given to a person who is the subject of the will. In other words, if you come into the legal office for a will, you are the testator of that will.

2. ***Beneficiary***. A beneficiary is a person or organization designated to receive some or all of your assets upon your death. You can name as many beneficiaries as you like.

3. ***Executor***. An executor is the person you appoint in your will to settle your estate. This person will have the administrative responsibility of paying your bills and taxes (including estate taxes), supervising the process of locating and safekeeping your assets, and making sure that the wishes expressed in your will are carried out. In essence, an executor is in charge of the estate.

4. ***Probate***. Probate is a court procedure by which assets pass from a deceased person to the proper beneficiaries. A judge has the authority to validate a will and then order that the assets subject to the will be distributed.

**The Importance of Having a Will**

There is a big misconception that if you die without a will ("intestate"), your estate passes to the state of your legal residence. Technically this is possible, but it is saved for the last resort. For example, if you are single with no children and living parents and want everything to pass to your parents, you don't need a will. In this scenario, the law states that your estate passes to your parents. Now, I could write for days on describing different scenarios but because the law of wills is so state specific each variation would be different from the next.

Here are some good rules of thumb for you to follow: (1) again, if you are single and wish everything to pass to your parents, you do not need a will, (2) if you are single and wish to devise real property or bequest personal property to persons other than your parents or siblings, get a will, (3) if you are married with or with out children, get a will. ***Remember, however, just because you feel that you do not need a will does not mean that you should not have a living will or durable power of attorney***. These documents can be prepared separately and are always highly recommended.

With that said, what actually happens if you die **without** a Will? That answer depends on which state you claim as your legal residence. While we can't outline every state's intestate laws here, there is some commonality. So, what happens if you die without a will while you are:

1. Married with children: Many people falsely believe that the surviving spouse/parent will always take all the deceased spouse's property. That is **not** always the case. The law of most states awards one-third to one-half of the decedent's property to the surviving spouse, and the remainder to the children, regardless of age. Then again, some states give the entire estate to the spouse as long as the children are of both parties. If you are married and have a child from another relation, chances are your current spouse will not receive the entire estate. With a will, you can cure this problem.

2. Married with no children: Again, there is a popular misconception that the intestate decedent's surviving spouse would take all. Most states, however, give only one-third to one-half of the estate to the surviving spouse. The remainder generally goes to the

decedent's parent(s), if alive. If both parents are dead, many states split the remainder among the decedent's brothers and sisters.

3. Single person with children: When a single person with children dies without a will, state laws uniformly provide that the entire estate goes to the children.

4. Single person with no children: In this situation, again, most state laws favor the decedent's parent(s) in the distribution of his/her property. If both parents are deceased, many states divide the property among the brothers and sisters. If you have neither parents nor siblings, most states will exhaust all remedies in finding a person of relation. If no such person is found, only then will your estate pass to the state.

**What happens if you marry after you drafted a will while you were single, but failed to update it upon marriage**? If there is a will, the surviving spouse can ***renounce*** it and the inheritance it contains (if any), and instead elect to take a share of the estate specifically provided by state law. This is a legal device originally intended for the protection of the wife. Historically, all of a family's property might be titled solely in the husband's name. The "elective share" protects a woman (or man) against being "written out" of a spouse's will.

For example, a husband might have all the couple's property in his name alone, and write a will directing all of it to his children by a previous marriage. The wife could file a petition in probate court to take her "elective share" of the estate under state law. Usually the surviving spouse can take about one third to one half of the estate. That share varies among the states, and so does the definition of "estate" that is used in the calculation. Also, state laws contain a very wide variety of significant details, limits, dollar allowances and exceptions. These are all involved in determining what and how much property the surviving spouse can elect to take from the deceased spouse's estate, *instead of* whatever he/she is left in the will.

**What about the children**? When there are minor children, a will should always be used to name a guardian(s) of their *persons* and *property*. Alternates should also be named. This should not be done any other way. Of course, if there is a surviving parent, he/she automatically is guardian, if living in the same household. In a divorce situation, the parent with legal custody of the child(ren) should designate a guardian. Understand, however, that if somebody besides the other parent is named, this designation might not be binding; when a custodial parent dies, the non-custodial parent always has priority in seeking guardianship and custody, unless unfit. Be aware, too, that the court will probably have to approve the proposed guardian eventually, even if named in a will (unless he/she is the surviving parent, in the same household). The purpose of the will in this regard, though, is to guide the court, and to avoid family arguments over who is better qualified.

If you feel it is necessary or appropriate, two guardians can be appointed - one over the child himself, and one (presumably experienced) over the child's property. Consider carefully, however, the appropriateness of leaving money or other property outright to young children, even if a qualified guardian is available. Guardianship is a cumbersome way to manage financial affairs. Periodic reports and accounting to the court are required, and flexibility is limited by law.

**What about "joint wills?"** We do not encourage married couples to enter into a joint will. This is a single will shared by two people, usually spouses. It typically contains the same provisions for each person – a husband leaves all his property to his wife, say, and vice versa, and after the death of both spouses the property typically goes to the children. The problem is that, in many states, as soon as one of the signatories dies, the joint will goes into probate. This means that the terms of the will are frozen for the surviving spouse.

**What about holographic wills? Why not just write your intentions on a bar napkin?** Approximately half the states recognize holographic wills, or wills that you write by hand. Of course, because you have the legal office at your disposal there really is no reason not to have a will professionally prepared. If you do decide to write your own will, you must write everything out in your own handwriting, date and sign the document, and then make sure that there is no other handwriting on the document – any marks in another person's handwriting will render the holographic will invalid. If you make a mistake or change your mind on something, don't cross anything out, because that will also invalidate the will. Be aware that a holographic will may turn out to be very expensive for your beneficiaries, since it is not unusual for special court hearings to be held to interpret what the will really says and to remedy omissions from the will.

**What if I bought property while stationed overseas?** If you bought property while stationed in England, the legal office strongly recommends that you obtain a separate will governed by English law to govern that property. This will should not begin with the standard language that renounces all other existing wills – you want this will read with your stateside will. Thus, the local will governing your property should refer to your stateside will.

## Conclusion

There is no hardened rule that says you must have a will. If you meet any of the criteria above, then you need a will to not only protect yourself and your possessions, but also for the benefit of your loved ones. Here is another rule of thumb for you: when in doubt, get a will. Stop by or call the legal office on 226-3553. Our walk-in hours for wills are Tu 0900-1200 & Th 1300-1600.

## POWERS OF ATTORNEY

A Power of Attorney (POA) is a written instrument that allows you (the "principal") to authorize your agent (your "attorney-in-fact") to conduct certain business on your behalf. It is one of the strongest legal documents that you can give to another person and, as such, should not be taken lightly. There are two types of POA; "general" and "special" (or limited). A general POA gives your agent very broad powers to act on your behalf and are usually discouraged. A special POA limits your agent's authority to act only on certain matters. Every act performed by your agent within the authority of the POA is legally binding upon you. Since a POA is such a powerful document, give it only to a trustworthy person, and only when absolutely necessary. ***Warning*** – A third party has the right to refuse to accept a POA. When in doubt contact the business prior to getting a POA to see what requirements are necessary in order to use the POA

There is no law or regulation specifying when you must give another your power of attorney. But another person cannot normally act for you in business or legal matters without

receiving your power of attorney. Thus, if you will be unable to act for yourself due to an assignment or a TDY, you should consider using a power of attorney.

### 1. General POA

General powers of attorney grant attorneys-in-fact broad powers and authority. They can be dangerous instruments in the hands of persons inexperienced in business matters, unstable in temperament, or anyone in whom the grantor does not have the utmost trust and confidence. The possibility of strained marital relations, particularly during an extended deployment, should be considered. The legal office recommends that if you have concerns, speak with someone from the legal office regarding the dangers of executing such a document. It's possible that a special or limited power of attorney could accomplish the purposes for which the general power is sought. Under no circumstances should a general power of attorney be drafted and executed unless it contains a specific termination date or other provisions for automatic revocation.

*Warnings!!* There are two important factors you should consider before you get a general power of attorney. First, remember there is no legal requirement that anyone or any institution recognize a power of attorney. Merely because your agent has your power of attorney does not mean that all businesses will allow your agent to act on your behalf. Second, even if the general power of attorney is accepted, your agent may obligate you in a way you never intended and for which you will be held accountable. The general power of attorney is very powerful and should be used sparingly.

### 2. Special POA

A special power of attorney is a limited power of attorney that only provides your agent the right to act for you to accomplish some specific purpose. Examples include:

a. Registering or selling your automobile or house,
b. Paying your taxes,
c. Shipping your household goods,
d. Obtaining medical care for your children, and
e. Cashing checks.

The authority of the attorney-in-fact is spelled out in the document, narrowly defining the areas in which you allow your agent to obligate you.

*Income Tax* -

If you want someone to file your federal income tax return for you, you must give your attorney-in-fact a special IRS power of attorney (Form 2848). You can find and download this form on the IRS web page at www.irs.gov. If you want someone to file a state income tax return for you, you must give your attorney-in-fact a special power of attorney. A general power of attorney is not sufficient.

*Real Estate –*

A power of attorney for real estate transactions requires you to specifically state a legal description (contained in the deed) of the real property (along with the street address) that you want your attorney-in-fact to buy or sell on your behalf. Your special power of attorney must state that you specifically authorize your attorney-in-fact to enter into a sales contract on your behalf and should state that he or she is empowered to sell only that specific property.

If your attorney-in-fact is acting as a buyer for you, the power of attorney should state that he is authorized and directed to comply with the state recording statutes by promptly recording the deed after purchase in the court clerk's office in the county where the property is located. Moreover, whenever a deed is signed pursuant to a power of attorney, both the deed and the power of attorney should be recorded and thus both need to be executed with the proper formalities (witnesses and notary).

**3. Not a will substitute**

Powers of attorney do not replace wills and do not prevent probate. Because the authority you have given your agent will terminate upon your death (or the date your agent learns of your death) the power of attorney will only serve to facilitate your business and personal affairs while you are away from home.

**4. Revocation**

A power of attorney is automatically revoked when: (1) your agent learns of your death, (2) the date specified in the document arrives, or (3) you affirmatively revoke or terminate the power of attorney and thus your agent's powers. To prevent misuse of a previously granted power of attorney you will need to destroy all copies of the document, including any copies held by the agent. Notice of the revocation should also be provided to your creditors. Limit the period that the power of attorney is in effect to the absolute minimum necessary to accomplish the task. Except in very unusual circumstances, no power of attorney should be granted for more than one year.

**5. Special Considerations**

a. Because we are overseas, you need to be aware that the POAs that we are discussing are U.S. based POAs. Thus, any dealings and affairs you may have off base while stationed here at RAF Lakenheath will need a local POA.
b. A POA becomes void upon the death of the principal.
c. A POA normally is void if the principal becomes physically or mentally incapacitated. However, appropriate "durability" language may be added to the POA, which will ensure that it remains valid during any period of incapacity.
d. Any third party has the right to refuse to accept a POA.
e. A POA should be given for only a limited time period (such as six months during a deployment). A third party is more likely to accept a POA with a recent date than one, which is many months or years old.

f. Many financial institutions and other businesses have their own POA'S which they prefer to be used to conduct business. It is a good idea to show your POA to all known third parties who may be dealing with your named attorney-in-fact to ensure that your POA is acceptable to them.

g. Never give a general POA when a special POA will accomplish the mission. There is less opportunity for abuse when only limited powers are given.

h. A special POA should be as specific as possible. For example, if you are authorizing an attorney-in-fact to sell a vehicle on your behalf, specify the vehicle, license number, vehicle identification number, the make/model/year of the vehicle, and any specific terms you will require. Your legal assistance attorney can help you tailor the POA to suit your precise needs.

i. You may revoke a POA before its expiration date by executing a revocation of the POA. Notice of the revocation must be delivered to the attorney-in-fact, as well as to all third parties who you know relied on the POA. If possible, recover from the attorney-in-fact and destroy the original and all copies of the POA. Even though the POA has been revoked, you may be responsible to any third party who did not receive notice of the revocation.

**6. Conclusion**

A power of attorney allows your agent to act for you in your absence. Special POAs drafted to fit individual needs on a one-time basis or for a limited period of time are usually your best choice. Stop be or call the legal office for more guidance and help in determining whether you need a power of attorney.

**OFFICE HOURS**

Walk-in Legal Assistance/Wills – Tuesday 0900-1200 and Thursday 1300-1600.

POA's (no appointment necessary) Monday – Friday, 0830 – 1630.